

No. 83-2118

IN THE

Supreme Court of the United States

October Term 1984

LLOYD VICKROY,

Petitioner,

vs.

ROCKWELL INTERNATIONAL CORPORATION, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION
2295,

Respondents.

On Petition for Writ of Certiorari from the
United States Court of Appeals Ninth Circuit.

**BRIEF OF RESPONDENT ROCKWELL
INTERNATIONAL CORPORATION IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

GIBSON, DUNN & CRUTCHER,
STEPHEN E. TALLENT,
333 South Grand Avenue,
Los Angeles, Calif. 90071,
(213) 229-7000,

*Counsel Appearing
Specially for Respondent,
Rockwell International
Corporation.*

Question Presented.

Rockwell International Corporation*

Did the district court abuse its discretion in denying petitioner's motion for entry of default against respondent Rockwell International Corporation on the ground that Rockwell had not been served and thus the district court had no jurisdiction over Rockwell?

*This list contains all direct and indirect active subsidiaries of Rockwell (other than wholly owned subsidiaries and active companies of which Rockwell directly or indirectly owns between 20 percent and 50 percent. A.C.S. Engineering Limited, United Kingdom; Arpel S.A., France; Autonetica, S.A., Mexico; Braseixos S.A., Brazil; Brasprendas S.A., Brazil; Collins Radio Company of Japan Limited, Japan; Compagnie Industrielle de Mecanismes S.A., France; Componentes Automotrices Rockwell-Standard y Compania Limitada, Chile; Dina Rockwell Nacional, S.A., Mexico; Draper de Mexico S.A. de C.V., Mexico; Ikegai-Goss Co. Ltd., Japan; Industrias Teluo S.A., Spain; Metalurgica Carabobo, C.A., Venezuela; Moligal Productora de Assentos de Automovel, Limitada, Portugal; Phi-Magnetronics Limited, United Kingdom; Rockitt, Ltd., U.S.A.; Rockwell Cerdans, S.A., Spain; Rockwell Standard of Australia Limited, Australia; Rockwell-Standard de Venezuela, C.A., Venezuela; Rockwell Valves S.A., France; Rockwell Walther Australia Pty. Limited, Australia; Rubery Owen-Rockwell (Europa) B.V., Netherlands; Rubery Owen-Rockwell Limited, United Kingdom; S.A.S.E.B. AG Eschen, Liechtenstein; Serrature Auto Ferroviarie Edili S.p.A., Italy; Serrature Auto Meridionali Stampi Attrezzature, S.p.A., Italy; SETEC, S.p.A., Italy; Tamet Compania Anonima, Venezuela; Telehoist Humblet, N.V., Belgium; Telehoist Storer Limited, United Kingdom; USHA Telehoist Limited, India.

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I.

STATEMENT OF THE CASE.

A. Introduction.

The federal rules no longer require a special appearance to challenge sufficiency of process; however, respondent Rockwell International Corporation ("Rockwell") submits this brief without in any way acknowledging that it has been served or that the Court has acquired jurisdiction over it. This brief is not directed to the merits but solely to the issue of whether the court of appeals correctly affirmed the district court's denial of petitioner's motion of default against respondent on the ground that it had no jurisdiction over Rockwell.

B. Facts and Procedural History.

In order to fully and fairly apprise the Court of the events and proceedings in question, Rockwell here sets forth the background of this case. On or about June 7, 1982 and September 29, 1982, petitioner attempted to serve Rockwell by mail pursuant to Federal Rule of Civil Procedure 4(d)(7) which allowed service of process in accordance with the relevant state law.¹ Service was not perfected on either occasion. Petitioner has never received any executed acknowledgment and receipt of the summons and complaint. Thus, under California Code of Procedure Section 415.30, service was never completed on Rockwell. Rockwell did not answer or otherwise respond to any of the complaints filed by petitioner since personal jurisdiction had not been obtained over it.

Petitioner twice moved the district court to grant default against Rockwell. Each time, Rockwell specially appeared in opposition to the motions. On August 18, 1982, the magistrate denied petitioner's motion on the ground that Rockwell had not been properly served (App. A). Again, by order dated October 12, 1982, the magistrate denied petitioner's motion for default, terming petitioner's motion "frivolous" (App. B). By order dated December 1, 1982, Judge Hall of the district court concurred with the magistrate's recommendation (Pet.'s App. A-1), ordering that petitioner's second amended complaint be dismissed with prejudice (Pet.'s App. A-3).

Petitioner appealed from the district court's dismissal of his action. The issue on appeal relating to Rockwell was whether the district court had personal jurisdiction over Rockwell. By memorandum dated February 8,

¹Federal Rule of Civil Procedure 4(d)(7) has been repealed. Rule 4(c)(2)(c)(i), which became effective on February 26, 1983, sets forth a similar provision for service of process in accordance with state law (App. C).

1984, Judges Trask, Choy and Skopil of the Ninth Circuit unanimously affirmed the district court's dismissal, holding that "Vickroy did not perfect service on Rockwell" and that "Rockwell did not submit to the jurisdiction of the court" by filing its opposition to the petitioner's motion for default (Pet.'s App. B-1). By order dated May 7, 1984, Judges Trask, Choy and Skopil denied petitioner's petition for rehearing and rejected the suggestion for rehearing en banc (Pet.'s App. B-4).

II.
ARGUMENT.

The district court and the court of appeals fully considered and correctly decided that petitioner's claim that default should have been granted was without merit. Petitioner now raises no special or important reasons that would justify the Court's reconsideration of the issues presented below.

A. Petitioner Did Not Perfect Service on Rockwell.

Federal Rule of Civil Procedure 4(d)(7) allowed service of process in accordance with the law of the state where the action is brought. Code of Civil Procedure Section 415.30, the applicable California statute, states that when service of the summons and complaint is attempted by mail, service, is "deemed complete on the date written acknowledgment of receipt of summons is executed, if such acknowledgement thereafter is returned to the sender." Cal. Code Civ. Proc. §415.30 (Deerings 1972). *See also Tandy Corp. v. Superior Court*, 117 Cal. App. 3d 911, 173 Cal. Rptr. 81 (1981) (holding service was not perfected since acknowledgment and receipt were not returned to plaintiff, even though the defendant signed a postal service return receipt). The penalty for failure to return the acknowledgment and receipt is not default judgment, rather failure may subject defendant to "liability for the payment of any expenses incurred in serving a summons" in another manner. Cal. Code Civ. Proc. §415.30 (Deerings 1972).

Therefore, petitioner never perfected service upon Rockwell since he did not receive an executed acknowledgment of receipt.² Neither the district court nor the

²Federal Rule of Civil Procedure 4(c)(2)(C)(ii), which became effective on February 26, 1983, states that the sender of the summons and complaint must receive an acknowledgment of service within 20 days after the date of mailing, or else must serve the

court of appeals stated that the federal rule or California statute were unconstitutional as petitioner claims, but rather they held that petitioner had not complied with the applicable provisions.

B. Rockwell Did Not Submit to the Court's Jurisdiction by Opposing Petitioner's Motion for Default.

The district court did not abuse its discretion in denying petitioner's motion for default. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (indicating an abuse of discretion standard.) The time for responding to a complaint is calculated from the date of service. California Code of Civil Procedure Section 415.30 states that service is not complete until the sender receives an executed acknowledgment of receipt. Since petitioner never received a written acknowledgment of receipt, the time in which to respond never began to run, and no default could be taken against Rockwell. Under Federal Rule of Civil Procedure 12, Rockwell had no obligation to answer or otherwise respond since it was not served. Fed. R. Civ. P. 12. *See also* 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 4.09, 4-110 — 4-112.

Rockwell's opposition to petitioner's motion for default was based upon petitioner's failure to serve process. This opposition did not constitute submission to the court's jurisdiction. *See Hays v. United Fireworks Mfg. Co.*, 420 F.2d 836, 843-44 (9th Cir. 1969) ("special" appearance no longer necessary to challenge sufficiency of process without submitting to court's jurisdiction); *see also Wright v. Yackley*, 459 F.2d 287, 291 (9th Cir. 1972).

summons and complaint in accordance with other provisions for service of process (*i.e.*, personal service by an authorized person). Even if this provision had been in effect when petitioner attempted to serve Rockwell, service still would not have been effective.

III.

CONCLUSION.

Petitioner failed to serve Rockwell according to express statutory provisions; therefore, the district court did not abuse its discretion in denying petitioner's motion for default on this ground. Petitioner has not provided any reasons which would justify the Court's reconsideration of the well-settled law on this issue. Thus, the petition for a writ of certiorari should be denied.

Dated: July 24, 1984

Respectfully submitted,
GIBSON, DUNN & CRUTCHER,
STEPHEN E. TALLENT,

*Attorneys Appearing Specially for
Respondent Rockwell International
Corporation.*

APPENDIX A.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES — GENERAL**

Case No. CV82-2748-CHH(T) Date: August 18, 1982

Title: LLOYD VICKROY VS. ROCKWELL INTER-
NATIONAL CORPORATION ET AL.

DOCKET ENTRY

PRESENT:

HON: VENETTA S.
TASSOPOULOS

Sue Rosenfeld
Deputy Clerk

MAGISTRATE

Gloria Himes/Tape 695A&B
Court Reporter

ATTORNEYS PRESENT
FOR PLAINTIFFS:
Lloyd Vickroy, Pro Per

ATTORNEYS PRESENT FOR
DEFENDANTS:
Kenneth D. Hoffman
Elizabeth R. Lishner

PROCEEDINGS: hearing on Defendant's Motion to
Dismiss

Court makes determination that Rockwell International Corporation has not been properly served. Therefore, Plaintiff's Motion for Default is ordered Denied. Plaintiff's Motion to Quash Opposition is also denied.

Clerk is ordered to denominate "Civil Complaint, Amended Memorandum of Points and Authorities", lodged on August 3, 1982, as Plaintiff's First Amended Complaint and to be filed on this date.

Defendant's Motion to Dismiss is Granted as to the Complaint and First Amended Complaint. Plaintiff is granted leave to file a Second Amended Complaint within thirty (30) days.

Court orders Plaintiff to clearly identify his document as Second Amended Complaint and advises Plaintiff that this is the last amended complaint to be filed in this case.

APPENDIX B.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES — GENERAL

Case No. CV82-2748-CHH(T) Date: October 12, 1982

Title: LLOYD VICKROY VS. ROCKWELL INTER-
NATIONAL CORPORATION ET AL.

DOCKET ENTRY

PRESENT:

HON: VENETTA S.
TASSOPOULOS

MAGISTRATE

Sue Rosenfeld
Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT
FOR PLAINTIFFS:
None Appearing

ATTORNEYS PRESENT FOR
DEFENDANTS:
None Appearing

PROCEEDINGS: (IN CHAMBERS)

The hearing set for October 27, 1982 at 10:00 A.M.
as to Plaintiff's Motion for Default filed September
30, 1982 is ordered off calendar.

Based on Defendant Rockwell's opposition, and for
good legal cause, Plaintiff's Motion for Default is
ordered denied.

Plaintiff has been advised of the defects of the serv-
ice. Any further frivolous motions in this regard will
result in imposition of sanctions against Plaintiff.

cc: Lloyd Vickroy
Kenneth D. Hoffman
Elizabeth R. Lishner

APPENDIX C.

Federal Rule of Civil Procedure 4(d)(7)(repealed)

(d) **Summons: Personal Service.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Federal Rule of Civil Procedure 4(c)(2)(C)(i)(ii)

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule —

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of

this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

Federal Rule of Civil Procedure 12(b)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

California Code of Civil Procedure Section 415.30

§415.30 [Service by Mail: Articles mailed: Form of notice: When service complete: Liability for expense on failure to return acknowledgment: Approval form]

(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

(b) The notice specified in subdivision (a) shall be in substantially the following form:

(Title of court and cause, with action number, to be inserted by the sender prior to mailing)

NOTICE

To: (Here state the name of the person to be served.)

This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure. Failure to complete this form and return it to the sender within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons upon you in any other manner permitted by law. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed in the name of such entity by you or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. Section 415.30 provides that this summons is deemed served on the date of execution of an acknowledgment of receipt of summons.

Signature of Sender

ACKNOWLEDGEMENT OF RECEIPT
OF SUMMONS

This acknowledges receipt on (insert date) of a copy
of the summons and of the complaint at (insert address).

Date: _____

(Date this acknowledgement is executed)

Signature of person acknowledging
receipt, with title if acknowledgment
is made on behalf of another person

(c) Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender.

(d) If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgement form set forth in subdivision (b) within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method permitted by this chapter, and, except for good cause shown, the court in which the action is pending, upon motion, with or without notice, shall award the party such expenses whether or not he is otherwise entitled to recover his costs in the action.

(e) A notice or acknowledgment of receipt in form approved by the Judicial Council is deemed to comply with this section.